

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	No. 56287-8-I
)	
Respondent,)	DIVISION ONE
)	
v.)	
)	
JEROME BASIM MANNAN,)	UNPUBLISHED
)	
Appellant.)	FILED: <u>August 7, 2006</u>
)	
)	

PER CURIAM –The unit of prosecution for robbery is defined by the taking of the property and the forcible taking from the presence of a person against his or her will.¹ Following Jerome Mannan’s conviction of two counts of first degree robbery, the court merged the two convictions, but did not dismiss either count. Because under the circumstances of this case, there was only one taking from a commercial business, the remedy for the violation of double jeopardy is to vacate the conviction of the lesser included offense.² Accordingly, we vacate the second robbery conviction and remand for resentencing. We also conclude that the trial court properly considered and determined Mannan’s prior

¹ State v. Tvedt, 153 Wn.2d 705, 715, 107 P.3d 728 (2005).

² State v. Weber, 127 Wn. App. 879, 885, 112 P.3d 1287 (2005), review granted, 156 Wn.2d 1010 (2006).

criminal history and offender score. There was no violation of his rights under the Confrontation Clause, and Mannan was not denied the right to an impartial jury. We affirm the conviction for count one of first degree robbery, vacate the conviction for count two, and remand for further proceedings.

On June 30, 2003, Mannan was at the Nordstrom Rack when security agents observed him select a number of items and put them into his pocket, including a bottle of perfume. As he left the store, the agents approached and asked to speak with him. He put his hands behind his back and pulled a knife, threatening the two agents. He left the parking lot, and the agents followed him at a safe distance.

As the agents followed Mannan, they asked him to return the stolen merchandise. He allowed them to look inside a department store bag he was carrying. It did not contain any Nordstrom property. The agents observed Mannan go inside the hotel next door.

The manager of the hotel testified that she saw Mannan enter the hotel and briskly walk toward the elevators. She heard the elevators ding and assumed Mannan had gone upstairs. Moments later, several responding officers arrived at the hotel. As the hotel manager was describing Mannan to them, the elevators opened. Mannan stepped out and the officers immediately detained and later arrested him.

Mannan was advised of his constitutional rights and signed a waiver of those rights. He told the officers that after he decided not to purchase anything

from the Nordstrom Rack, he left to meet his girlfriend, Felicia, in room 211 of the hotel where they apprehended him. They later returned to that floor, searched further, and discovered the stolen merchandise and the knife in a conference room located on that floor.

Mannan was tried on two counts of first degree robbery. A jury convicted him as charged. In response to Mannan's double jeopardy argument at sentencing, the court sentenced him to 168 months, finding that counts one and two merge under State v. Tvedt.³ But it did not vacate either conviction.

Mannan appeals.

DOUBLE JEOPARDY

Mannan argues that the trial court violated his right against double jeopardy by failing to dismiss count two in his judgment and sentence. We agree.

After Mannan was convicted of two counts of first degree robbery, the supreme court issued its decision in State v. Tvedt,⁴ defining the unit of prosecution for robbery. The supreme court held that the unit of prosecution is "defined both by the taking of property and that the forcible taking be from or from the presence of a person against his or her will."⁵ The Tvedt court stated that if there is only one taking from a commercial business, then there can be a **conviction** for only one count, regardless of the number of employees present

³ 153 Wn.2d 705.

⁴ 153 Wn.2d 705.

⁵ Id. at 715 (emphasis omitted).

who have authority over the property.⁶

At sentencing, the court made a notation on the judgment and sentence that “counts 1 [and] 2 merge pursuant to State v. Tvedt . . . and are the same criminal conduct.” But that action is not the proper remedy for this double jeopardy violation. Rather, because Mannan was convicted of two counts of first degree robbery, the proper remedy is to vacate the second count.⁷

PRIOR CONVICTIONS

Mannan also argues that he was deprived of his rights to due process and trial by jury because the trial court relied on his prior criminal history to calculate his offender score. We disagree.

The United States Supreme Court has not specifically overruled Almendarez-Torres v. United States.⁸ and the Federal Constitution does not require prior convictions to be proved to a jury beyond a reasonable doubt.⁹ Thus, the trial court properly included Mannan’s prior criminal history in calculating his offender score.

ADDITIONAL GROUNDS FOR REVIEW

Mannan raises several arguments in his statement of additional grounds for review. He argues that his offender score was miscalculated, he was denied his Sixth Amendment right to confrontation under Crawford v. Washington,¹⁰ and

⁶ Id. at 715-16 (emphasis added).

⁷ Weber, 127 Wn. App. at 885.

⁸ 523 U.S. 224, 118 S. Ct. 1219, 140 L. Ed. 2d 350 (1998).

⁹ State v. Rivers, 130 Wn. App. 689, 695, 128 P.3d 608 (2005) (citing Ring v. Arizona, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002)).

he was denied his right to a fair trial because of jury bias. None of these arguments are persuasive.

Offender Score Calculation

A sentencing court must "look to the statute in effect at the time [the defendant] committed the [current] crimes" when determining a defendant's sentence.¹¹ RCW 9.94A.525(2) in relevant part provides:

Class C prior felony convictions other than sex offenses shall not be included in the offender score if, since the last date of release from confinement . . . pursuant to a felony conviction, if any, or entry of judgment and sentence, ***the offender had spent five consecutive years in the community without committing any crime*** that subsequently results in a conviction.^[12]

Under the 2002 Sentencing Reform Act (SRA) amendments, RCW 9.94A.525 "properly and unambiguously require that sentencing courts include defendants' previously 'washed out' prior convictions when calculating defendants' offender scores at sentencing for crime committed on or after the amendments' effective date."¹³ We review offender score calculations de novo.¹⁴

¹⁰ 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

¹¹ State v. Varga, 151 Wn.2d 179, 191, 86 P.3d 139 (2004) (quoting State v. Delgado, 148 Wn.2d 723, 726, 63 P.3d 792 (2003)).

¹² (Emphasis added.)

¹³ Varga, 151 Wn.2d at 183; RCW 9.94A.525(18) provides:

The fact that a prior conviction was not included in an offender's offender score or criminal history at a previous sentencing shall have no bearing on whether it is included in the criminal history or offender score for the current offense. Accordingly, prior convictions that were not counted in the offender score or included in criminal history under repealed or previous versions of the sentencing reform act shall be included in criminal history and shall count in the offender score if the current version of the sentencing reform act requires including or counting those convictions.

At sentencing, Mannan argued that his Michigan convictions from 1971 to 1976 washed out because he had five consecutive years of felony free crimes. However, under RCW 9.94.525(2), which was in effect when Mannan committed this crime, a defendant must be crime free for five consecutive years, including misdemeanor convictions. Mannan was released from his 1976 Michigan conviction in 1978 and had a misdemeanor theft conviction in 1981. Mannan was not crime free for five years. Thus, the trial court properly concluded that Mannan's Michigan convictions do not wash out.

Next, Mannan argues that the Washington equivalent for his Michigan Attempted Larceny in a Building conviction is theft, which is a misdemeanor in Washington. Mannan provides no support for this argument. We will not review an issue unsupported by authority or persuasive argument.¹⁵

Mannan also argues that his convictions for: Forgery (3 counts) and Third Degree Assault in 1990; Attempted First Degree Theft and Second Degree Theft in 1995; and Third Degree Assault (2 counts) and VUCSA Possession in 1998 were run concurrent and should only have counted as one point for each date of the offense, instead of two points.

Under the SRA, multiple current offenses are presumptively counted separately in determining a defendant's offender score unless the trial court finds that current offenses encompass the "same criminal conduct" and the crimes are then counted as one crime in determining the offender score.¹⁶

¹⁴ State v. Roche, 75 Wn. App. 500, 513, 878 P.2d 497 (1994).

¹⁵ See State v. Johnson, 119 Wn.2d 167, 171, 829 P.2d 1082 (1992).

This argument has no effect on his offender score because two or more offenses run concurrently are counted individually unless they are the same criminal conduct. They were not.

We hold that the trial court properly calculated Mannan's offender score.

Confrontation Clause

The confrontation clause of the Sixth Amendment provides that "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."¹⁷ In Crawford v. Washington, the United States Supreme Court held that "[w]here testimonial evidence is at issue . . . the Sixth Amendment demands what the common law required: unavailability and a prior opportunity to cross-examination."¹⁸ Nontestimonial statements do not implicate the Confrontation Clause.¹⁹

The Supreme Court did not provide a precise definition of "testimonial", but stated that the term "applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations."²⁰ The "most important [factor] in determining whether a statement is testimonial . . . is the witness's *purpose* in initiating police contact and making the statement. The witness's purpose is essential because it goes to whether or not the

¹⁶ RCW 9.94A.589(1)(a).

¹⁷ U.S. CONST. amend. VI.

¹⁸ 541 U.S. at 68.

¹⁹ State v. Shafer, 156 Wn.2d 381, 388, 128 P.3d 87 (2006) (citing Crawford, 541 U.S. at 68).

²⁰ Shafer, 156 Wn.2d at 388 (quoting Crawford, 541 U.S. at 68).

declarant would reasonably expect his or her statement to be used at a later trial . . .

.²¹

Here, Mannan argues that his Sixth Amendment right to confrontation was violated because of the brief statement of an unnamed witness to the officer in the hotel. The witness stated to the officer that a man matching Mannan's description was on the second floor. He bases his argument on the fact that the officer related the statement during testimony at trial, but the witness did not testify.

There are two reasons why this claim is without merit. First, there is no rational basis to conclude that the brief statement by the witness was testimonial in terms of the Confrontation Clause. Second, even if it were proper to conclude that the statement was testimonial, any error is harmless beyond a reasonable doubt. Mannan himself told the officers that he had gone to the second floor of the hotel to meet someone. It is on that basis that they returned, searched, and discovered the stolen items that Mannan presumably had in his possession when he drew the knife on the two security agents.

Right to an Impartial Jury

Mannan argues that the jury was tainted because during voir dire, three prospective jurors made biased comments. However, none of these jurors were

²¹ State v. Mason, 127 Wn. App. 554, 563, 126 P.3d 34 (2005) (holding a victim's statements to a domestic violence advocate were not testimonial because they involved the victim's "profound fear and his pleas for help." The victim was "seeking protection, not bearing witness to a crime.").

selected to sit on the jury. Thus, Mannan was not denied the right to an impartial jury.

We affirm the conviction for count one of first degree robbery, vacate count two, and remand for further proceedings.

For the Court:

Cox, J.

Dwyer, J.

Eleenfon, J.